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No. 04-1404

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WORLDWIDE BASKETBALL AND SPORT TOURS, INC., *et al.*,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT REQUIRED BY RULE 29.6

The National Collegiate Athletic Association is a non-profit entity and does not issue stock.

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A writ of certiorari is not appropriate in this case. The Sixth Circuit's opinion is a straightforward and sound application of its own precedent, which is consistent with the precedent of this Court and that of the other Circuits. The Sixth Circuit applied the unassailable rule throughout the courts that in an antitrust case it is a plaintiff's duty to allege and prove a relevant market by substantial evidence. Failure to do so is fatal to an antitrust claim and properly caused the Sixth Circuit to reverse the District Court's erroneous entry of a permanent injunction against the National Collegiate Athletic Association ("NCAA").

The Petition's misstatements of fact and misapplication of law are merely an attempt to manufacture the appearance of a Circuit split — no such split exists. Likewise, there is no important issue of federal law that needs to be settled by this Court. The rules of law applied by the Sixth Circuit are well-settled and elementary to antitrust law. Thus, none of the prerequisites for granting a writ of certiorari as specified in Rule 10 of the Supreme Court Rules are met in this case.

STATEMENT OF THE CASE

Unfortunately, Petitioners' Statement of the Case attempts to mislead the Court as to the record to concoct a fictitious split among the Circuits. There is no error in the Sixth Circuit's decision, which merely applies well-established precedent to correct the trial court's errors on relevant market and the rule of reason. Stripped of Petitioners' distortions, it is plain that this case is not one that requires review by this Court.

In 2000, Petitioners, four sports event promoters who arrange a few college basketball events, filed a complaint

alleging that various NCAA rules regulating intercollegiate basketball violate the Sherman Act. The Complaint challenged rules adopted in 1999 revising how frequently teams are eligible (only twice in any four years, the "two-in-four" rule) to participate in special athletic contests, known as "certified events," which offer "free" games that do not count toward the season maximum limit.

Petitioners sought a preliminary injunction against the "two-in-four" rule.[1] The District Court converted the motion into a motion for permanent injunction, and held an evidentiary hearing. In its July 19, 2002 Opinion and Order, the District Court found that Petitioners had not shown harm to competition in what it found to be the relevant market, "men's Division I college basketball." The District Court held that a full rule of reason analysis was required for any antitrust examination of the two-in-four rule, and that the adverse effects of the two-in-four rule on output in the relevant market would determine whether this Court finds an antitrust violation. Appendix at 99a.[2] The District Court also ruled that it would hold the motion in abeyance to determine the impact of the rule over the remaining two years of its initial four year cycle. Appendix at 105a.

Before the cycle was complete, Petitioners renewed their motion for injunctive relief. The District Court again held a

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[1] The rule simply limits the frequency with which Division I teams may participate in "certified events" which are multiple-game tournaments. It permits teams to play in such events twice in any four-year period and makes participation count as one game even though multiple games are played.

[2] References herein to "Appendix __" are to the Appendix to the Petition.

hearing on a permanent injunction, and on July 28, 2003, entered an Opinion and Order finding that the two-in-four rule violated § 1 of the Sherman Act, and permanently enjoined the rule.

The 2003 Order rejected Petitioner's expert's opinion and his proposed "submarket" of pre and postseason tournament events. The District Court again found a relevant market of Division I men's basketball. However, contrary to those findings, the District Court incorrectly went on to find a relevant "submarket" for "school-scheduled" games, a "market" to which the parties had not agreed and which the evidence did not support. The District Court also erroneously claimed that it was applying a full "rule of reason" analysis while actually employing a cursory "quick look" analysis.

The Sixth Circuit stayed the 2003 Order pending appeal. Petitioners moved to vacate the stay, asking Justice Stevens, as Circuit Justice, to act. Justice Stevens denied the motion on August 26, 2003.

On November 15, 2004 the Sixth Circuit reversed after argument holding that the District Court erred in finding that Petitioners had met their burden of proving a relevant market and in adopting a market that was neither agreed to nor proven. Petitioners assert that the "parties, their experts and the court agreed that a relevant market for antitrust purposes is Division I men's college basketball." Petition at 3.[3] Petitioners fail to point out, however, that Division I men's college basketball was not the market that the District Court

[3] The parties did not agree or stipulate to *any* relevant market. Neither the District Court nor the Sixth Circuit found a substantial reduction in output in any broader market.

adopted for its antitrust analysis. Instead, the District Court erroneously adopted a so-called "submarket" within that relevant market that was explicitly rejected by the NCAA's expert and unsupported by Petitioners' evidence.[4] The Sixth Circuit correctly recognized this error and reversed.[5]

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[4] For purposes of analyzing an antitrust claim there is only one relevant market in which the claims are to be analyzed. The Department of Justice and the Federal Trade Commission's Horizontal Merger Guidelines state: "A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy [the SSNIP] test." The SSNIP test refers to the process of defining a market such that "a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price [SSNIP], assuming the terms of sale of all other products are held constant." 1992 Horizontal Merger Guidelines, Revised in 1997 ("Merger Guidelines") § 1.0 available at *http://www.usdoj.gov/atr/public/guidelines/hmg.htm#11*, visited June 19, 2005. The merger Guidelines do not refer to submarkets at all. *See also,* 2A Phillip K. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 533(c) at 201 (2d Ed. 2001) ("Speaking of submarkets is both superfluous and confusing in an antitrust case, where the courts correctly search for a 'relevant market' — that is, a market relevant to the particular legal issue being litigated.").

[5] Petitioners' statement that "a divided panel of the Sixth Circuit reversed" is misleading. Petition at 4. Judge Gibbons' concurring opinion did not disagree with the majority that petitioners had failed to prove a relevant market or that the District Court had erred in adopting a submarket without proof. Rather, Judge Gibbons wrote that petitioners' "failure to establish that they have suffered an antitrust injury," precluded the need for further analysis because in her view, lack of antitrust injury, hence antitrust standing, make it "unnecessary to consider whether the plaintiff promoters [had] met their burden of proving that a relevant market exists . . ." *Worldwide*

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REASONS FOR DENYING THE PETITION

A. The Sixth Circuit's Opinion is Consistent with This Court's Precedent and the Law of all Other Circuits with Respect to the Framework of Proof of Anticompetitive Effects.

Petitioners first assert that the Court should review this case to eliminate a long-standing rule that antitrust analysis must begin with the definition of the relevant product market. Apart from its inconsistency with long-standing precedent, petitioners' argument rests on a fundamental misunderstanding of the Sixth Circuit's decision and a conflation of the antitrust analytic tools of market definition and market power.

1. The Sixth Circuit was Correct in Finding that this Case was Best Suited for Full Rule of Reason Analysis and that Such Analysis was not Properly Applied by the District Court.

Petitioners argued for adjudication of the two-in-four rule under the quick look standard in the District Court. That Court, however, ostensibly rejected quick look analysis in favor of the full rule of reason in finding that the challenged rule "simply does not have the 'obvious anticompetitive effects' . . . so as to dispense with the full rule of reason analysis." Appendix at 81a. The District Court acknowledged

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Basketball & Sports Tours, Inc. v. NCAA, 388 F.3d 955, 964 (6th Cir. 2004), Appendix at 18a, 19a. Judge Gibbons noted that in the market for college basketball games petitioners had failed to prove antitrust injury. 388 F.3d at 966, Appendix at 20a.

that this case required full rule of reason analysis because the two-in-four rule's effects were far from obvious and involved an industry "in which horizontal restraints on competition are essential if the product is to be available at all." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984) (quoted in District Ct. Opinion, Appendix at 78a).

Petitioners now disingenuously attempt to confuse full rule of reason and quick look analysis in order to concoct an issue for this Court to address upon certiorari. This Court recently clarified "quick look" analysis in *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), and no further clarification is needed. Petitioners argue that precise market definition can be dispensed with in rule of reason cases, as in quick look cases, when anticompetitive effects are proven. *California Dental* reveals the fallacy of this argument. In *California Dental*, this Court explained that an "enquiry meet for the case" is required, which "look[s] to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the *market* has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction" can be made with a quick look. 526 U.S. at 781 (emphasis added).

California Dental further explained:

> In each of these cases, which have formed the basis for what has come to be called abbreviated or "quick look" analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on ***customers and markets***

526 U.S. at 770 (emphasis added) (citing *Bd. of Regents*, 468 U.S. 85 (1984) and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986)). In each of the two cases which *California Dental* cites for the genesis of quick look analysis there was some (albeit less than precise) delineation of the market in which the Court found that the challenged restraint would obviously produce anticompetitive effects. In *Bd. of Regents* the District Court had found a relevant market of live college football games on television, 468 U.S. at 94, and this Court held that the District Court had correctly found that price and output had been affected in this market. *Id.* at 104-05. In *Federation of Dentists* this Court held that "in light of the reality that markets for dental services tend to be relatively localized," 476 U.S. at 460, it was sufficient for the government to identify the approximate geographic area in which competition was adversely affected, namely "two localities in the State of Indiana (the Anderson and Lafayette areas), [where] Federation dentists constituted heavy majorities of the practicing dentists," and therefore no further precise definition of the market was necessary. *Id.* at 461. This Court did not dispense with market definition in cases where the product market is unclear and disputed.[6]

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[6] In this respect petitioners' reliance on *Toys "R" Us Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000) is confusing and unavailing. The Seventh Circuit explained the two ways of measuring market *power* clearly: "One is through direct evidence of anticompetitive effects. The other, more conventional way, is by proving relevant product and geographic markets and by showing that the defendant's share exceeds whatever threshold is important for the practice in the case." 221 F.3d at 937 (internal quotation omitted). The Seventh Circuit did not state that market definition is unnecessary in a rule of reason case. The Seventh Circuit later elaborated on its *Toys "R" Us* opinion in *Republic Tobacco Co. v. North Atlantic Trading Co.*, 381 F.3d 717 (7th Cir. 2004). In *Republic Tobacco* the relevant geographic

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The Sixth Circuit correctly followed this Court's teaching in finding rule of reason analysis appropriate because

> [f]ar from being a case in which "an observer with even a rudimentary understanding of economics could have concluded that the arrangements in question would have an anticompetitive effect on *customers and markets*," here the relevant market is not readily apparent . . . making it impossible to assess the effect of [the rule] on customers rather than merely on competitors.

Worldwide Basketball, 388 F.3d at 961, Appendix at 12a, (quoting *California Dental*, 526 U.S. at 770) (emphasis in Sixth Circuit's opinion).

The Sixth Circuit's reasoning is entirely consistent with *California Dental* and established authority. In industries like intercollegiate sports that require some horizontal cooperation in order to produce the core products, this Court and Circuit Courts have found that challenged restraints must be evaluated under the full rule of reason. *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979); *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504 (9th Cir. 1989); *Brookins v. International Motor Contest Ass'n*, 219 F.3d 849 (8th Cir. 2000); *Smith v. NCAA*,

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market was disputed and the Seventh Circuit explained that '*Toys 'R' Us* and *Indiana Federation of Dentists* do not excuse North Atlantic from providing evidentiary support for its putative Southeast geographic market. Economic analysis is virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market." 381 F.3d at 737.

139 F.3d 180, 185 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999). There is no Circuit split on this issue.[7]

Nor is there a Circuit split as to how a full rule of reason analysis is to be applied. This Court has noted that "in the absence of *per se* liability, [plaintiff] has the burden of proving that [defendant] violated the Sherman Act because it unreasonably restrained competition. That burden necessarily involves an inquiry into the actual effect of the [challenged restraint] on competition" in a defined relevant market. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 30 (1984). The Sixth Circuit held here that when a district court purports to apply a full rule of reason analysis, the district court must require plaintiff to prove the relevant market in which the challenged restraint is to be analyzed,

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[7] Petitioners' other citations are equally misleading. *Todd v. Exxon Corp.*, 275 F. 3d 191 (2d Cir. 2001) is the only § 1 case cited by petitioners involving rule of reason analysis. *Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101 (2d Cir. 2002) and *Great W. Directories v. Southwestern Bell Tel. Co.*, 63 F.3d 1378 (5th Cir. 1995) are both § 2 monopoly cases that do not involve rule of reason analysis. Furthermore, the Second Circuit in *Pepsico* noted that without evidence of direct adverse effects "market power necessarily must be determined by reference to the 'area of effective competition' — which in turn, is determined by reference to a specific, defined 'product market.'" 315 F.3d at 108 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962)). Similarly, the Fifth Circuit in *Great W. Directories* noted that "the purpose of the market definition and market power inquiry is to determine whether an arrangement has the potential for genuine adverse affects [sic] on competition. Proof of actual detrimental effects can obviate the need for the inquiry into market power." 63 F.3d at 1384. The Fifth Circuit did not state that actual adverse effects obviate the need for market definition because it would be meaningless to find a monopoly without a definition of the market in which that monopoly exists.

especially when the product market is "neither obvious nor undisputed." *Worldwide Basketball*, 388 F.3d at 961, Appendix at 12a. This is a correct and consistent application of the law.

Although the District Court had unequivocally concluded in 2002 "that application of the 'quick look' rule of reason approach is not appropriate" to the two-in-four rule (Appendix at 80a) and that under the rule of reason it "must first define the relevant product market" (Appendix at 53a), its decision ultimately went on to disregard this burden. The District Court correctly rejected the proposed "submarket" of pre and postseason basketball tournaments offered by petitioners' expert because he had not founded his opinion on sound methodology. Appendix at 44a. However, the District Court instead erroneously purported to find a "submarket" for school-scheduled games based solely on the testimony of the NCAA's expert, who unequivocally testified to the contrary.[8]

Upon review of the record, the Sixth Circuit consequently reversed, finding that "the relevant market is not readily apparent and the Plaintiffs have failed to adequately define a relevant market, thereby making it impossible to assess the effect of [the rule] on customers rather than merely on competitors." *Worldwide Basketball*, 388 F.3d at 961, Appendix at 12a. The Sixth Circuit's requirement that plaintiff prove a relevant market for rule of reason analysis is wholly consistent with this Court's decisions, Sixth Circuit case law and cases from other Circuits. *See, e.g., Gough v. Rossmoor Corp.*, 585 F.2d 381, 389 (9th Cir. 1978),

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[8] The District Court's mistakes as to the evidence of the relevant market are discussed in Part B of this brief.

cert. denied, 440 U.S. 936 (1979) (before courts can consider an antitrust claim, they "must know with what field of competition we are concerned and the dimensions of that field. Market definition is essential."); *Spectrum Sports v. McQuillan*, 506 U.S. 447, 455 (1993); *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers*, 325 F.3d 712, 720 (6th Cir. 2003); *Graphic Products Distrib. v. Itek Corp.*, 717 F.2d 1560, 1569 (11th Cir. 1983) ("In order to establish the defendant's market power, a plaintiff must first offer proof of a well defined relevant market upon which the challenged anticompetitive actions would have a substantial impact.") (internal quotation omitted).

2. There is no Circuit Split on the Requirement to Define a Relevant Market for Full Rule of Reason Analysis and Petitioners' Contention of a Circuit Split is Based Upon a Misapplication of the Law.

Petitioners' very formulation of the first question requiring resolution by this Court is fundamentally misleading, because they pose a question that in itself mischaracterizes what the Sixth Circuit did. Petitioners assert that the Court should review to address the question: "may plaintiffs use proof of significant anticompetitive effects as proof of market power in any antitrust case, or is such proof limited to 'quick look' rule of reason cases?" Petition at 5. This is not the question addressed by the Sixth Circuit. Rather, the Sixth Circuit held that when a District Court purports to use full rule of reason analysis, plaintiffs must meet their burden of defining a relevant market in which the alleged anticompetitive effects are to be analyzed. If a plaintiff shows only an incidental effect on competitors, its burden is not discharged by labeling these effects as "actual anticompetitive effects" without any reference to market

alternatives or consumer choice. *Worldwide Basketball*, 388 F.3d at 961, Appendix at 12a.

Petitioners attempt to manufacture a Circuit split on the role of market power in rule of reason analysis. In fact, there is no Circuit split on the well established requirement for proof of the relevant market in a rule of reason analysis. Petitioners argue that the Sixth Circuit's opinion is in conflict with the Second Circuit, claiming that *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001) held that a showing of market power obviated the need for market definition. Petitioners' argument is a *non-sequitur*. Market power is meaningless without a definition of the market in which that power is being exerted, and the Second Circuit did not hold otherwise. The Second Circuit's opinion in *Todd* addressed defendants' motion for judgment on the pleadings. The Second Circuit explicitly held that plaintiff had carried her burden of alleging a plausible relevant market and that plaintiff continued to bear the burden of proving this market at trial. 275 F.3d at 203-04.

Only after holding that plaintiff continued to bear the burden of proving the alleged market at trial, did the Second Circuit discuss market power. Petitioners conflate market power with market definition. Contrary to Petitioners' contention, the Second Circuit never suggested that plaintiffs in a rule of reason case do not need to prove the relevant market in which a defendant's market power is to be assessed. The petitioner's use of ellipses in their quote from *Todd* is misleading. The *Todd* court merely noted that after a market is defined, there is no requirement of "showing of market share [as] a prerequisite for bringing a § 1 claim," 275 F.3d at 207, because market share is only an indirect way of showing market power, which may also be shown by actual

anticompetitive effects. The Second Circuit noted that dispensing with a showing of market power where actual anticompetitive effects are proven is not limited to quick look cases, but it did not state, and it does not follow, that market *definition* may be dispensed with in a rule of reason case. 275 F.3d at 207.[9] The Sixth Circuit's opinion is in harmony with the Second Circuit: "Under the 'quick-look' approach, extensive market and cross-elasticity analysis is not necessarily required, but where as here, the precise product

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[9] The cases cited in *Todd* reinforce that plaintiff carries the burden of defining a relevant market in a rule of reason case. In *KMB Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 123 (2d Cir. 1995), the Second Circuit found that there existed an "aftermarket for automotive exhaust products" in which KMB had failed to show adverse effects or market power by Walker. 61 F.3d at 129. In *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc.*, 996 F.2d 537 (2d Cir. 1993), the court accurately defined plaintiffs' burden as follows: "plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice." 996 F.2d at 543. The Court then explained that proof of market power is unnecessary if plaintiff proves actual adverse effects. *Id.* at 546. Notably, Capital had defined the relevant product market in this case as the market for radiological services, and the geographic market as the area lying within a 100 miles radius of Albany, New York, and defendants had accepted these market definitions. *Id.* at 547. Finally, the Third Circuit in *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993) held that "plaintiff bears an initial burden of showing that the alleged combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic markets, and satisfy this burden by proving the existence of actual anticompetitive effects." Since proof of actual adverse effects in a relevant market is often difficult to make, courts substitute a showing of market power for adverse effects. 5 F.3d at 668. However, this does not remove a plaintiff's burden of proving a relevant market.

market is neither obvious nor undisputed, the failure to account for market alternatives and to analyze the dynamics of consumer choice simply will not suffice." *Worldwide Basketball*, 388 F. 3d at 961, Appendix at 12a. Petitioners attempt to escape their failure of proof by commingling concepts of market definition and market power.[10]

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[10] "The analysis of market power begins with the definition of the relevant market, which provides the context in which to evaluate the restraint's effect on competition." ABA ANTITRUST SECTION, MONOGRAPH NO. 23, THE RULE OF REASON 108 (1999). *See also* 2A Phillip K. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 531(a) at 187 (2d Ed. 2001)

> Market definition is the initial step in assessing market structure. . . . While the inferences to be drawn from market shares are limited, there may be no practical alternative when the data are insufficient to find the firm's elasticities of supply and demand or its residual demand curves. If known, these numbers would measure market power directly without any need for market definition. Because they seldom have such data, antitrust courts traditionally define a market and examine the firms' market shares.

Areeda and Hovenkamp also note that there are other ways of proving market power that do not rely heavily on market definition — excess returns, price discrimination, intellectual property, contracts, evidence of excluding rivals, direct evidence from demand curves. *Id.* at ¶¶ 516-521. However, none of these are applicable to the case before this Court where there was no evidence of increased prices, excluded rivals, or price discrimination.

B. Petitioners Misstate the Facts by Claiming there was An Agreement as to the Market the District Court Analyzed.

1. The Sixth Circuit Correctly Found that there was No Agreement or Stipulation with regard to a Relevant "Submarket," and it is Disingenuous for Petitioners to Claim it did.

Petitioners' expert, Dr. Tollison, proposed a "submarket" consisting of pre and postseason men's Division I basketball tournaments. However, Dr. Tollison did not perform any adequate study to measure substitutability. Appendix at 38a. The District Court correctly excluded Dr. Tollison's testimony on relevant market because he had offered "no basis from which to conclude that a submarket of pre-season and post-season tournaments is an appropriate definition ..." Appendix at 44a. However, the District Court then committed reversible error by *inferring* the existence of a different "submarket" of school-scheduled games based on its mischaracterization of testimony by defendant's expert, Mr. Guth, ignoring his explicit testimony denying that such a submarket of school-scheduled games was appropriate.

The District Court specifically said that it was relying on the NCAA's expert in finding a relevant "submarket" of school-sponsored games. Appendix at 47a. However, the NCAA's expert expressly *denied* there was such a relevant submarket.

> Q. There has been testimony here and a claim that you proposed a submarket of school-scheduled games? Do you agree with that?

> A. I don't agree with it . . . I indicated that the so-called school-scheduled games . . . represent a category of particularly close substitutes.

(Tr. 6/18/03 at 143-44, JA 1527-28).[11] In response to the District Court's own questions, Mr. Guth further testified:

> THE COURT: You know, I want to be clear on that. Is it your testimony that the relevant market definition is what exactly?
>
> THE WITNESS: The relevant market definition is clearly men's Division I college basketball.

(Tr. 6/19/03 at 47, JA 1623). He then went on to emphasize this point:

> Q. And if you look at Paragraph 18, it says, "As noted earlier, the most important product, for purposes of this litigation, should be defined as school-scheduled games."
>
> A. Yes.
>
> Q. Aren't you saying there that that's the relevant product market as otherwise you indicated in the heading?
>
> A. ***Neither in words nor in intent . . .***

(Tr. 6/19/03 at 49, JA 1625) (emphasis added). Notwithstanding Mr. Guth's clear testimony, the District

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[11] References herein to "JA __" are to the Parties' Joint Appendix filed with the Sixth Circuit in this case.

Court asserted that he testified there was a "submarket" of "school scheduled games." Appendix at 47a. The District Court was simply wrong as to Mr. Guth's testimony, and wrong in finding that a submarket for school scheduled games existed that could serve as a relevant market for antitrust analysis.

Thus, contrary to the core assertion of the Petition, there was no agreement or stipulation by the parties to the relevant market utilized by the District Court. The District Court simply misunderstood the testimony of defendant's expert. As the Sixth Circuit accurately explained:

> [T]he district court relied on what it found to be the opinion of the defendant's expert, Mr. Guth, that the relevant submarket is school scheduled games — an opinion with which the court said Dr. Tollison had agreed.
>
> * * *
>
> At trial, however, when he was pointedly asked by counsel whether by this he was saying that the relevant market is school-scheduled games, Guth responded: "Neither in words nor in intent." .. . Given this record, it would be difficult to conclude that Mr. Guth named school-scheduled games as the relevant submarket. Accordingly, we decline to relieve the Promoters of their burden based on such a dubious stipulation by the defendant's expert.

Worldwide Basketball, 388 F.3d at 963, Appendix at 16a-17a.

It is disingenuous for petitioners to suggest that the Sixth Circuit held that parties may not stipulate to a relevant market. That was not an issue in this case nor was it a part of the Sixth Circuit's decision. Rather, the Sixth Circuit correctly held that a District Court may not *assume* that parties agreed or stipulated to a relevant market when there is unrebutted testimony to the contrary. Nothing in that holding warrants review by this Court.

2. Given the Parties' Disagreement as to the Relevant Market, the Sixth Circuit Properly Imposed the Burden of Proof on Plaintiffs.

Having correctly concluded that the parties had not agreed to the relevant "submarket" adopted by the District Court, the Sixth Circuit reversed because petitioners failed to meet their burden of proving the existence of a relevant market. This Court and the other Circuits concur that the burden to prove a relevant market in a rule of reason case resides with the plaintiff. It is well established that plaintiff must define and prove the contours of the relevant market in which its allegations of anticompetitive harm are to be analyzed. *See Spectrum Sports*, 506 U.S. at 455; *Plymouth Whalers Hockey Club*, 325 F.3d at 719-20; *Queen City Pizza, Inc. v. Domino's Pizza*, 124 F.3d 430, 436 (3d Cir. 1997); *Tanaka v. NCAA*, 252 F.3d 1059, 1063 (9th Cir. 2001).[12]

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[12] A plaintiff must first define a relevant market in order to state a claim under the antitrust laws. Determining the relevant market enables the court to assess whether the defendant has monopoly power in that market, what the area of competition is, and whether the allegedly unlawful acts have anticompetitive effects in that market.

Cupp v. Alberto-Culver USA, Inc., 310 F. Supp. 2d 963, 969 (W.D. Tenn. 2004) (internal citations omitted).

The Sixth Circuit's sound application of such a well-established rule belies petitioners' mischaracterization of the record below, and shows that this case is not one suitable for review by this Court.

CONCLUSION

The Sixth Circuit's opinion below is a straightforward and sound application of its own precedent, which is consistent with the precedent of this Court and that of the other Circuits. The Sixth Circuit applied the unassailable rule throughout the courts that it is a plaintiff's duty to allege and prove a definable antitrust market by substantial evidence. No sound basis exists for this Court to exercise its discretion to review this case. Accordingly, the Petition for writ of certiorari should be denied.

Respectfully submitted,

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